

THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

UNITED STATES OF AMERICA
ex rel. RAYMOND BURK

Plaintiff,

v.

AKAL SECURITY INC., d/b/a AKAL
SECURITY SERVICES and JOHN DOE
INDIVIDUALS and CORPORATIONS 1-25

Defendant.

Civil Action No.
3:05-CV-629 WHB-AGN

**UNITED STATES' OPPOSITION
TO RELATOR'S MOTION TO
APPROVE SETTLEMENT**

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The United States of America respectfully urges the Court to deny Relator Raymond Burk's Motion to Approve Settlement for three reasons: (1) the False Claims Act, 31 U.S.C. §§ 3729-3733, does not require the Court to "approve" the settlement before dismissing the case, but rather requires the "written consent" of both the Court and the Attorney General; (2) the Attorney General has not provided "written consent" to the settlement and consequently dismissal of the case or approval of the settlement is premature; and (3) the remaining relief that the Relator seeks, such as an award of attorney's fees and a percentage of the settlement proceeds, would require evidentiary hearings that may not be necessary if the parties successfully reach agreement on these issues.

In further support of its Opposition to the Motion to Approve Settlement, the United

States avers as follows:

BACKGROUND

1. This action was filed by Relator Raymond Burk pursuant to the *qui tam* provisions of the False Claims Act, 31 U.S.C. §§ 3729-33, which allow a private party to bring a civil action on behalf of the United States government, and provide that the “action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.” 31 U.S.C. 3730(b)(1).

2. The United States declined to intervene in this case on July 20, 2006. Subsequent to the United States’ Notice of Declination (Doc. 3), the Court issued its Order on Procedure Following Declination by the United States, which provided that “should the relator or the defendant propose that this action be dismissed, settled, or otherwise discontinued, the Court will solicit the written consent of the United States before ruling or granting its approval.” (Doc. 5).

3. On April 5, 2007, after a court-ordered settlement conference, Magistrate Judge Anderson issued an Order of Dismissal in this case. (Doc. 42).

4. On April 19, 2007, the United States filed a Motion for Reconsideration of the Order of Dismissal (Doc. 43), which argued that the dismissal of this action was premature because the Attorney General did not give his “written consent to the dismissal [or his] reasons for consenting,” as required by the False Claims Act. 31 U.S.C. § 3730(b)(1). The Relator informed counsel for the United States that he does not object to the Motion for Reconsideration.

5. Despite not objecting to the United States’ Motion for Reconsideration, the Relator filed a Motion to Approve Settlement (Doc. 44) on April 23, 2007. The Motion to Approve Settlement asks the Court to (1) “approve” the settlement of this civil action, (2) award

the Relator thirty percent (30%) of the settlement proceeds, and (3) additionally award the Relator the amount of attorney's fees and costs that were negotiated between the Relator and Defendant Akal Security, Inc. ("Akal") (Doc. 44 at 3). The Motion to Approve Settlement was not accompanied by any exhibits, affidavits or other forms of evidence.

6. The Court has not held any evidentiary hearings in this case, and has never considered any evidence as to the amount of the Relator's costs and fees, his entitlement to have them paid, or his purported entitlement to 30% of the settlement proceeds.

ARGUMENT

7. The Relator's Motion to Approve Settlement should be denied because the False Claims Act does not require the Court to "approve" a settlement before dismissing a declined *qui tam* action, but rather requires both the Court and the Attorney General to give their "written consent" and their "reasons for consenting." 31 U.S.C. § 3730(b)(1). The United States respectfully suggests that the Court should not consent to dismissal of this action unless and until the Attorney General provides his "written consent to the dismissal [and his] reasons for consenting," as required by the False Claims Act. Counsel for the United States informed the Court at the April 5, 2007 settlement conference, as well as in its Motion for Reconsideration, that he does not have authority to consent to any proposed settlement on behalf of the Attorney General, but that he would expeditiously inform the Court of the Attorney General's position once it is obtained.

8. The consent of the Attorney General will depend upon a number of factors, some of which have not yet been negotiated between the parties and the United States (such as the Relator's share). Accordingly, the Court's "approval" or consent to dismissal would be

premature. Though the United States is not a party to this declined *qui tam* action, the United States is the “real party in interest” because the Relator brought this action on behalf of the United States. United States ex rel. Laird v. Lockheed Martin Engineering and Science Services Co., 336 F.3d 346, 357 (5th Cir. 2003). The United States will receive the majority of any financial settlement, 31 U.S.C. § 3730(d)(2), and has numerous interests in the content of any eventual settlement agreement. The United States urges the Court to allow the parties and the United States time to negotiate all outstanding issues. If the parties fail to reach agreement, any remaining issues can be the subject of future hearings and eventual determination by the Court.

9. The United States also urges the Court to deny the Relator’s other requests – to award the Relator thirty percent (30%) of the settlement, and additionally to award the Relator reasonable attorney’s fees and costs – because both requests would require the Court to conduct evidentiary hearings that may be unnecessary if the parties successfully negotiate and settle the outstanding issues. The amount of the Relator’s “reasonable” costs and fees, as well as his purported entitlement to have them paid, is an issue of empirical inquiry that would require the Court to hold an evidentiary hearing and examine the basis for those costs and fees. Similarly, a judicial determination of the “reasonable” amount of the award to the *qui tam* plaintiff under 31 U.S.C. § 3730(d)(2) would require the Court to hear evidence regarding a variety of areas, such as (1) the extent of the Relator’s cooperation with the government investigation, (2) the specificity and helpfulness of the Relator’s mandatory “written disclosure of . . . material evidence,” 31 U.S.C. § 3730(b)(2), (3) the extent of the Relator’s knowledge of the alleged wrongdoing, (4) the Relator’s commitment to not harming the United States’ interests by seeking excessive counsel fees or whistleblower compensation, (5) the amount of time and effort spent by

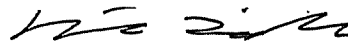
the Relator litigating the case, (6) whether the Relator's proposed settlement adequately defends the financial interests of the United States in this matter, etc. These sorts of inquiries would be time-consuming and a waste of judicial resources in a case such as this, where the parties and the United States have indicated a willingness and a desire to negotiate all outstanding issues between them without resorting to further judicial intervention.

CONCLUSION

10. For the foregoing reasons, the United States respectfully urges the Court to deny the Motion to Approve Settlement.

Respectfully submitted,

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¹ The United States Attorney and all Assistant United States Attorneys for the Southern District of Mississippi are recused from this case.

CERTIFICATE OF SERVICE

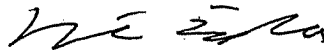
I hereby certify that on April 24, 2007, a copy of the foregoing was served via first class mail and/or the court's electronic filing system to:

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